

SOUTH AFRICA / JUDGMENT

Mandonsela and Others v South African Local Government Bargaining Council and Others (JR1754/18) [2020] ZALCJHB 45 (13 February 2020)

[2020] ZALCJHB 45

COURT

Labour Court Johannesburg

BEFORE

A Patel

CASE / FILE NUMBER

JR1754/18

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JR1754/18

In

the matter between:

LAWRENCE
MADONSELA AND 194 OTHERS Applicant
and
SOUTH AFRICAN LOCAL
GOVERNMENT
BARGAINING
COUNCIL
First
Respondent
TIMOTHY
BOYCE
N.O. Second
Respondent
EKHURULENI
METROPOLITAN MUNICIPALITY
Third Respondent
HLANIKI
INVESTMENT HOLDINGS (PTY) LTD
Fourth Respondent

Heard: 14 January 2020
Delivered: 13 February 2020

JUDGMENT

PATEL, AJ

Introduction

[1] This is an application to review and set aside an award issued by the Second Respondent on 7 June 2018 under the auspices of the First Respondent. In his award, the Second Respondent found that the Applicants had been dismissed by the Third Respondent. The dismissals of the Applicants were procedurally unfair. He awarded the Applicants 3 months compensation for their unfair dismissal. He also found that no temporary employment service relationship exists between the Third and Fourth Respondent.

Background

facts

[2] The Applicants were mostly employed by the Third Respondent as plumbers and cleaners.

[3] The Applicants were employed by the Third Respondent over two employment periods. The first employment period endured from 3 March 2014 to 30 June 2015. During this period two consecutive fixed term contracts were signed between the Applicants and the Third Respondent (First Employment Period). The second employment period endured from 15 December 2015 to 31 August 2016 ('the Second Employment Period'). A fixed term contract of employment was concluded during the Second Employment Period.

First Employment Period (3 March 2014 – 30 June 2015)

[4] The first fixed term contract was signed in February 2014 ('the First Contract'), with the Applicants due to begin work on 3 March 2014. It terminated by the effluxion of time on 3 March 2015. The First Contract was concluded before the Labour Relations Amendment Act[1] which came into effect on 1 January 2015.

[5] Upon the termination of the First Contract, the second fixed term contract (the Second Contract) was signed between the Applicants and the Third Respondent on 3 March 2015 and expired on 30 June 2015.

The Second Employment Period (15 December 2015 – 31 August 2016)

- [6] The Second Employment Period commenced on 15 December 2015 the Applicant signed a third fixed-term contract (the Third Contract) which expired on 31 August 2016. There was a lapse of approximately 5 and a half months between the Second and Third Contract.
- [7] The Third Contract differed from the First and Second Contract in that it was signed between the Applicants, the Fourth Respondent and the Gauteng Enterprise Propeller (GEP). The GEP is a separate legal entity established in terms of Section 2 of the Gauteng Enterprise Propeller Act[2] of the Gauteng Provincial Legislature. The Third Respondent was not a party to the Third Contract.
- [8] The Fourth Respondent was engaged by the Third Respondent to amongst others programme manage the services to the GEP. The GEP was engaged by the Third Respondent to co-ordinate a "job-creation programme" (the programme), in which the Applicants were supposed to partake.
- [9] After the commencement of the Second Contract the Applicants referred a dispute, categorized on the referral form as a 198A dispute[3] to the First Respondent. It was conciliated on 11 November 2015 and referred for arbitration on 18 January 2016 (the first dispute). This dispute dealt with whether the Applicants were permanently employed by the Third Respondent pursuant to section 198A. (TES Dispute).
- [10] On 8 June 2015 and whilst still operating during the First Employment Period under the Second Contract, the Applicants received letters of termination from the Third Respondent notifying them of their upcoming termination of employment at the expiry of the contract on 30 June 2015. On 30 June 2015, the Applicant's tendered their services to the Third Respondent but were turned away because their fixed-term contracts had terminated by effluxion of time.
- [11] On 7 September 2016, the Applicants referred a second dispute to the First Respondent (the second dispute). They classified the nature of their dispute as a dismissal (Dismissal dispute).
- [12] In terms of all three fixed term contracts, the Applicants earned R2000.00 per month and worked eight hours per day. The Applicants' salaries were paid by the Third Respondent under the first two contracts and by the Fourth Respondent under the Third Contract.
- [13] On 31 January 2018, the Second Respondent issued a joinder ruling in terms of which the Fourth Respondent was joined as a party to the second dispute. On 22 February 2018 and under an application by the Applicants, the Second Respondent issued a ruling consolidating the first and second disputes

The Arbitration Award

- [14] On 7 June 2019, the Second Respondent issued his arbitration award. In respect of the Dismissal Dispute, the Second Respondent stated as follows:

"9. This dispute concerns the alleged unfair dismissals of the applicants

on 30 June 2015 when the applicants' second fixed term employment contract with the 1st respondent (hereinafter referred to as the Municipality) expired. The alleged dismissals are predicated on the assertion that, when the second fixed term employment contract with the Municipality expired on 30 June 2015, the applicants' employment contracts with the Municipality were deemed to be of indefinite duration in terms of Section 198B(5) of the Labour Relations Act 66 of 1995, as amended (the Lra). It was common cause that the applicants earned less than the threshold prescribed by the Minister of Labour in terms of Section 6 (3) of the Basic Conditions of Employment Act."

[15] In respect of the TES Dispute, the Second Respondent summarised the nature of the dispute as follows:

"10. This dispute concerns the contention that the applicants were deemed to be permanently employed by the Municipality (and, therefore, dismissed by the Municipality) when their fixed term employment contracts with Hlaniki, a temporary employment service (TES), expired on 31 August 2016. The Applicants' argument in respect of the second arbitration is based on Section 198A and Section 198B of the LRA."

[16] In respect of the Dismissal dispute the Second Respondent had to determine whether the Applicants were unfairly dismissed. If they were, what was the appropriate remedy.

[17] In respect of the TES Dispute the Second Respondent had to determine whether the Applicants were permanently employed by the Third Respondent pursuant to section 198A of the Labour Relations Act[4] (LRA).

[18] The Applicants contended, amongst others:

"In respect of the first dispute the Applicants were permanently employed by the Third Respondent by virtue of section 198B of the LRA. They were unfairly dismissed by the Third Respondent on termination of the Second Contract. The Second Respondent should have reinstated them as oppose to awarding them compensation."

[19] Regarding the Second Dispute the Applicants contend that the Third Respondent is their employer by virtue of section 198A of the LRA. They further contend that the Third Respondent was a client of the Fourth Respondent even though:

19.1 the Third Respondent is not party to the contractual agreement between the Fourth Respondent and GEP;

19.2 the Third Respondent regarding the Third Contract paid no remuneration to the Applicants; and

19.3 the GEP was not a party to the arbitration hearing

[20] The issues to be determined were correctly identified by the Second Respondent as the following:

First Arbitration

- a) Whether the Applicants were dismissed by the Third Respondent on 30 June 2015.
- b) Whether, if the Applicants were dismissed, there was a fair reason for their dismissals.
- c) Whether, if the Applicants were dismissed, the dismissals were preceded by a fair procedure

Second Arbitration

- a) The issue to be determined regarding the Second Arbitration is whether the Applicants were deemed permanently employed by the Third Respondent when their fixed term employment contracts with the Fourth Respondent expired on 31 August 2015.'

[21] After considering the provisions of the LRA, the Second Respondent concluded:

"In respect of the first arbitration, the Second Respondent took heed of the fact that the Second Contract exceeded the three (3) month period set in the LRA and found that the nature of the work being performed under the Second Contract was ongoing in nature and not of a limited or definite duration. It was further found that section 198B(3) and section 198B(4) of the LRA could not be used to provide a justifiable reason for fixing the terms of the contract as the contract was neither an official public works scheme or similar public job creation scheme and the work was of an ongoing nature and therefore the Applicants were also not employed to work exclusively on a specific project that has a limited or defined duration.

In light of the above, the Applicants were dismissed when they were prevented from rendering services to the Third Respondent after 30 June 2015 and therefore discharged the onus on them to prove that they had been dismissed. It was further found that although the Applicants sought reinstatement, such a remedy was not reasonably practicable in the circumstances as the Third Respondent never had the intention of permanently employing the Applicants. As such, it was found that the only suitable remedy would be that of a compensation award and compensation equal to three (3) months remuneration to each of the Applicants was awarded.

Turning to the second arbitration, the deeming clause contained in section 198A(3)(b) of the LRA only applies when there is a tripartite relationship between employees, a temporary employment services and a client. However, the Third Contract which was concluded between the Fourth Respondent and GEP, and, on the other hand, the Applicants, created no such tripartite relationship. As such, there was no temporary employment service and no client, the employment relationship was one between the Applicants, the Fourth Respondent and GEP.

Therefore, regardless of whether the conclusion of the fixed term contract was or was not justified in terms of section 198B(4) of the LRA, it was axiomatic that the Applicants cannot be deemed to be permanently employed by the Third Respondent. The Applicants were found to have failed to discharge the onus on them to prove that they were dismissed."

Grounds of review

- [22] The Applicants allege that the Second Respondent committed a material error in law in failing to look beyond the written terms of the Third Contract concluded between the parties and in doing so, misidentified the true nature of the enquiry when determining whether a temporary employment services relationship existed between the Fourth Respondent, the Third Respondent and the Applicants.
- [23] The Applicants further allege that the Second Respondent had to look beyond the written terms of the contracts concluded between the parties and instead confined himself to the description of the parties as they appeared on the Third Contract.
- [24] The Third Respondent did not file a cross review against the Second Respondent's decisions. The Third Respondent accepted that the Second Respondent's decision was reasonable insofar as he found that the Applicants were permanently employed by the Third Respondent. It also accepted that 3 months compensation was one that a reasonable commissioner could arrive at because of the Applicant's dismissal by the Third Respondent.

Evaluation: the unfair dismissal claim

- [25] The issue I am required to determine is whether the Second Respondent's compensation award of three months was reasonable in the circumstances or, as sought by the Applicants, whether the Applicants should be reinstated.
- [26] In *SACCAWU and others v Woolworths (Pty) Ltd*[5] (*SACCAWU*), the Constitutional Court held:

"[46] Reinstatement must be ordered when a dismissal is found to be substantively unfair unless one of the exceptions set out in s 193(2) applies...

- [47] As affirmed by this court previously, the fact that a significant period might have lapsed from the date of dismissal to the date of the judgment is not a bar to reinstatement. An employee whose dismissal is substantively unfair should not be disadvantaged by the delays of litigation where she or he has not unduly delayed in pursuing the litigation."

- [27] The Constitutional Court in *SACCAWU* further held that:

"[50] An employer must lead evidence as to why reinstatement is not reasonably practicable and the onus is on the employer to demonstrate to the court that reinstatement is not reasonably practicable..."

[28] Of specific importance to the inquiry is section 193(2)(c) of the LRA. In this respect, I agree with the Second Respondent when he concluded that reinstatement is not reasonably practicable because there was never an intention by the Third Respondent to employ the Applicants permanently. It was not reasonable to permanently employ the Applicant as the work was for a limited duration. Therefore, the Second Respondent's award in awarding compensation as oppose to reinstatement is one that a reasonable commissioner sitting in the position of the second respondent would have arrived at.

[29] In terms of section 194(1) of the LRA, compensation awards must be just and equitable in all the circumstances but cannot exceed 12 months.

[30] The Constitutional Court in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[6] stated as follows regarding compensation awards:

"[50] To compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA. Zondo JP outlined the applicable factors in these terms:

"There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

...

- (b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair.
- (c) In so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.
- (d) In so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.
- (e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

- (f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.
 - (g) In so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.
 - (h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes."
- [51] Generally speaking, an unfair dismissal ought to earn an employee compensation where reinstatement is not feasible by reason of the intolerability of the continued working relationship...
- [52] In terms of our law compensation is not automatic. It is a discretionary matter. A whole range of factors must be taken in to account to determine whether compensation has to be paid and if so, for how many months. In this regard one of the key factors is the need to ensure that employers are not inadvertently encouraged by the non-payment of compensation to adopt a shotgun approach of dismissing employees without affording them the opportunity to be heard. Employees are ordinarily vulnerable because, unlike employers, they do not often have the resources necessary to vindicate their rights by prosecuting cases all the way up to this Court. Condoning the flouting of laws that govern the fate of people's livelihood is a matter so serious that it always requires greater sensitivity and care."
- [31] Having regard to the principles set out above, the Applicants length of service at the Third Respondent, the manner in which their contracts were terminated and the reasons for their termination I am of the view that a compensation award equal to 12 months' remuneration to each of the Applicants constitutes "just and equitable" compensation in the circumstances.
- [32] Consequently the Second Respondent's award regarding compensation is not one which a reasonable commissioner sitting in the position of the Second Respondent would have come to. The Second Respondent's award of compensation in respect of the Unfair Dismissal dispute is reviewed and set aside. It is replaced with an order that the Third Respondent must pay each of the Applicants an amount of 12 months remuneration as compensation for their unfair dismissal.

Evaluation: the TES dispute

- [33] The Applicants contends that the Fourth Respondent is a temporary employment service under the Third Contract and that the Third Respondent is a "client" in terms of section 198B of the LRA.

What is a temporary employment service?

[34] In terms of section 198 of the LRA, a temporary employment service is defined as follows:

"(1) In this section, "temporary employment services" means any person who, for reward, procures for or provides to a client other persons -

- (a) who perform work for the client; and
- (b) who are remunerated by the temporary employment service."

[35] In the case of Proctor and Gamble Manufacturing SA (Pty) Ltd and Another v Mokadi and Others[7] (Proctor and Gamble) this Court held in respect of temporary employment services:

"[16] In terms of section 198A (3) an employee performing a temporary service is the employee of the temporary employment services provider. However, an employee not performing such temporary service for the client is deemed to be an employee of the client, and the client is deemed to be his employer. Such an employee is subject to the provisions of section 198B, employed on an indefinite basis by the client.

[17] In order for an arbitrator to determine whether the temporary service employees are to be deemed employees (in terms of section 198A(3)), the relationship between the parties must be one of a client and temporary employment service provider."

[36] In Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others[8] ("Assign Services") the Constitutional Court stated as follows:

"[73] In evaluating these arguments, it is necessary first to consider the "triangular" nature of the TES/client/placed employee relationship. The triangular relationship exists to split the functions of the employer between the TES and the client for a fee. However, the functions for which the TES is responsible seldom relate to the actual work of the employee. Their primary responsibilities are to pay and manage the human resources component of employment, while the day-to-day management, work allocations and performance assessment in most circumstances are conducted by the client only. The client is also responsible for the employees' working conditions because employees are placed on the client's premises. Importantly, the client also has the power to discontinue the employee's services. In a sense, the TES is merely the third party that delivers the employee to the client. The employee does not contribute to the business of the TES except as a commodity. And, on a practical level, the contract between a TES and a placed worker seldom constitutes an employment contract.

[74] In LAD Brokers, the Labour Appeal Court held that the common law does not necessarily regard the TES as the employer of the placed workers. In truth, a TES can operate without concluding contracts of employment with the workers it places. All that is required for the TES to constitute a statutory employer in terms of section 198 of the LRA is that it places workers with clients for a fee and remunerates those workers. Of course, this is less onerous than the test for establishing conventional employment either at common law or in terms of

the relevant definitions. It is therefore incorrect to contend that a TES is usually in an employment relationship with workers it places with clients."

[37] The Labour Court in *Mandla v LAD Brokers (Pty) Ltd*[9] correctly pointed out that a contract between an employee and a temporary employment service creates a unique and sui generis tripartite relationship in which the employee renders personal services not to the employer but to the employer's client. Even though a client can influence certain employment decisions in such a temporary employment service's arrangement, the parties, by section 198, may structure their relationship "in this way even if the principal purpose is to make the labour broker (and not its client) the person who is responsible for managing

employees and ensuring compliance with the various statutes that regulate employment rights." [10]

[38] The service level agreement concluded between the Third Respondent and the Fourth Respondent, following a tender process, appointed the Fourth Respondent as the project management company to manage the Lungile Mtshali Poverty Alleviation Project on behalf of the Third Respondent for the period 11 December 2015 until 11 December 2018. A reading of this agreement shows that the Fourth Respondent is not operating as a temporary employment service, but as a project manager. The Fourth Respondent's core business as agreed upon by the Applicants is not the provision of labour. If this is not the Fourth Respondent core business, it cannot be regarded as a Temporary Employment Service Provider

Who is the Client?

[39] Counsel for the Applicants submit that, on a purposive reading of the service level agreement entered between the Fourth Respondent and the Applicants, the Fourth Respondent is operating as a temporary employment service. Referring to the authorities I have set out above, a temporary employment service creates a tripartite relationship, where there is an employer (the temporary employment service), the employer's client and the employees, who perform work not for the employer, but for the employer's client.

[40] The Applicants submit that the Third Respondent is the client, despite the Third Respondent not being a party to the agreement concluded between the Fourth Respondent and the Applicants. The Applicants therefore submit that a commercial or contractual relationship between the employer and the client is unnecessary for a temporary employment service to be found to exist. I cannot agree with this submission. There is no basis for this Court to disregard the express wording of an agreement or to ignore the practical application of the argument.

- [41] As correctly held in Proctor and Gamble, to determine whether employees are employees of a temporary employment service deemed to be employees in terms of section 198A(3), the relationship between the parties must be one of a client and temporary employment service provider. Should this not be the case, the deeming provision in section 198A does not find application.
- [42] In Assign Services, the Constitutional Court considered the triangular nature of the temporary employment service/client/placed employee relationship and stated that the triangular relationship exists to split the functions of the employer between the temporary employment service and the client for a fee. The Court in Assign Services went further and stated, on a practical level, the contract between a temporary employment services and a placed worker seldom constitutes a contract of employment.
- [43] For the Fourth Respondent to be regarded as a temporary employment service, there must exist a client. On the Applicants version, the Third Respondent constitutes the client, the Fourth Respondent constitutes the temporary employment service and the Applicants constitute the employees. However, in line with the jurisprudence, a commercial or contractual relationship must exist between the client (Third Respondent), the temporary employment service (the Fourth Respondent) and the employees (the Applicants). No such relationship exists
- [44] The Applicants have provided insufficient legal reasons why I should ignore the express written terms of the Service Level Agreement, the commercial relationship which existed between the Fourth Respondent and the GEP; and the fact that there was no contractual or commercial relationship between the Third and Fourth Respondent.

[45] In the premises the following order is made:

Order

1. The order of compensation awarded by the Second Respondent is reviewed and substituted with an order that the Third Respondent is ordered to pay compensation equal to twelve (12) months' remuneration to each of the Applicants.
2. The Applicant's remaining grounds of review against the arbitration award are dismissed.
3. There is no order as to costs.

A. Patel

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : Ms J Lawrence from Lawyers for Human Rights

For the respondent : N Damase of Majang Incorporated Attorneys

- [1] No. 6 of 2014.
- [2] No. 5 of 2005.
- [3] In terms of s 198A of the Labour Relations Act, No. 66 of 1995
- [4] No. 66 of 1995, as amended.
- [5] (2019) 40 ILJ 87 (CC).
- [6] 2017 (2) BCLR 241 (CC) (8 November 2016).
- [7] (JR895/16) [2018] ZALCJHB 80 (2 February 2018).
- [8] 2018 (11) BCLR 1309 (CC) (26 July 2018).
- [9] [2000] 9 BLLR 1047 (LC).
- [10] NUM v Billard Contractors CC [2006] 12 BLLR 1191 (LC) at para 79.
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